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June 11, 2015

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, Five9, Inc.
*Rules and Regulations Implementing the Telephone
Consumer Protection Act*; CG Docket No. 02-278

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice of the following presentations by Five9, Inc. ("Five9") concerning the Declaratory Ruling and Order listed on the FCC's Tentative Agenda for its June 18, 2015 Open Meeting.¹ On Tuesday, June 9, 2015, Five9 met, in separate meetings, with Amy Bender, Legal Advisor to Commissioner O'Rielly; and with Nicholas Degani, Legal Advisor to Commissioner Pai. In attendance on behalf of Five9 at each of these meetings were Steven A. Augustino, Alys Z. Hutnik and Matthew P. Sullivan of Kelley Drye & Warren LLP.

During the meetings, Five9 supported clarifications regarding the definition of an Automatic Telephone Dialing System ("ATDS") requested by PACE and other petitioners in this docket. Specifically, Five9 argued that an ATDS must have the *present capacity* to "store or produce telephone numbers to be called, using a random or sequential number generator." Five9 argued that the future capacity of a system, after modification, is not sufficient. Five9 noted that the record shows that consumers benefit from call management technologies that *do not* have the

¹ See Public Notice, *FCC Announces Tentative Agenda for June Open Meeting*, [no document number assigned] (rel. May 28, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0528/DOC-333693A1.pdf (last visited, June 10, 2015).

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capacity to store or produce random or sequential numbers. *See, e.g.*, Comments of American Financial Services Association, at 4, CG Dkt 02-278 (filed Dec. 2, 2013) (using a predictive dialer substantially reduces the likelihood of human error); Comments of Dial America Marketing, Inc., at 4-5, CG Dkt 02-278 (filed Dec. 13, 2013) (computer call management equipment enables companies to ensure that numbers are dialed in an appropriate time period, to regulate the number of times the phone will ring before disconnection and to enable the tracking of call details useful in future disputes). Five9 urged the Commission to follow those courts that have interpreted the TCPA to only reach systems with the present capacity to perform the relevant functions. *See, e.g., Modica v. Green Tree Servicing, LLC*, 2015 WL 1943222 (N.D. Ill) (Apr. 29, 2015) (finding that a cloud-based server which is separate from a dialer functionality does not have the present capacity to dial random or sequential numbers). Interpreting an ATDS to encompass systems with the future capacity, after modification, to store or produce random or sequential numbers not only would contradict the plain language of the statute, it would deprive consumers of the benefits of call management technology.

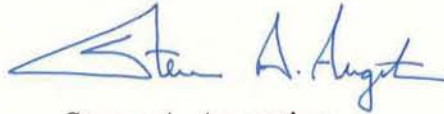
In addition, Five9 supported those commenters who pointed out that to be an ATDS, a system must dial numbers without human intervention. The FCC has consistently acknowledged this requirement since 2003. *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act*, Report and Order, 18 FCC Rcd 14014, para 132 (2003) (the “basic function” of an ATDS is to dial numbers “without human intervention”). Commenters have noted that preview dialers, “click to call” systems and other technologies requiring a user to select the number to be dialed. *See, e.g.*, Comments of Sirius XM Radio Inc., at 15, CG Dkt 02-278 (filed May 18, 2015) (preview dialing is the functional equivalent of manual dialing); Comments of the U.S. Chamber of Commerce, at 4 CG Dkt 02-278 (filed Dec. 19, 2013) (“human intervention is the key factor;” manually entering all digits and “one-click” dialing are equivalent processes); Comments of The Results Companies, at 2, CG Dkt 02-278 (filed Dec. 19, 2013) (any human intervention is sufficient). Five9 argued that an interpretation which classifies every smartphone as an ATDS is plainly overbroad and reduces the statutory factors to a nullity.

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In accordance with Section 1.1206(b)(2)(iii), this notice is timely filed.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a distinct "A" and "Augustino" following.

Steven A. Augustino

Counsel for Five9, Inc.

cc: FCC personnel listed above